IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: LILA, J.A., KOROSSO, J.A. And MWANDAMBO, J.A.)

CRIMINAL APPEAL NO. 554 OF 2020

IDRISA OMARY .....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dodoma

(Mansoor, J.)

dated the 24th day of July, 2020
in
DC. Criminal Appeal No. 64 of 2019

.....

JUDGMENT OF THE COURT

24th & 27th August, 2021

MWANDAMBO, J.A.:

The District Court of Kongwa tried and convicted Idrisa Omary, the appellant, of the charge of statutory rape. The charge sheet on which the appellant stood charged and convicted cited section 130 (1) (2)(b) (3) (e) and 131 (1) of the Penal Code, [Cap. 16 R.E. 2002 – now 2019]. Upon convicting him, the trial court meted out a sentence of 30 years imprisonment. The appellant's arraignment before the trial court was a result of the accusations alleging that on 20/05/2016 at Songambele village within Kongwa District,

Dodoma Region, he (the appellant) had carnal knowledge of a nine (9) years girl whom we shall henceforth refer to as the victim or PW1 to hide her identity. As the appellant pleaded not guilty to the charge, he stood trial resulting into the conviction and sentence.

The brief facts of the case were that the appellant, commonly known as Ustadh was a religious teacher at a madrassa in a mosque at Songambele village. The victim was one of his students at the madrassa. According to the victim's mother (PW2), on 20/05/2016, the victim attended the madrassa from 1600 hours along with her elder sister, Zahara Selemani (PW3). Later on, at about 1800 hours, the victim and her sister returned from the madrassa and broke the news that the Ustadh had raped the victim at his house where he had sent her to assist in cleaning the room along with another male student; Ibrahim Hussein who testified as PW7. Subsequently, PW2 reported the incident to the Imam of the mosque who advised PW2 to take up the matter to the mosque secretary to which she obliged. Karim Badru Kasmi (PW9), the mosque secretary directed the inspection of the victim instantly by his wife (PW8) and PW2 which is said to have revealed that the victim was bleeding from her vagina with some bruises suggesting that she had been carnally known. Upon interrogation, the victim is said to have mentioned

Ustadh Idrisa as the person responsible for the awful act. In the meantime, Hussein Haji (PW4) the father of the victim, reported the matter to William Wilson (PW5), the village Chairman who facilitated in obtaining a letter from the Village Executive Officer (VEO) with a view to taking the victim to the Hospital after obtaining the requisite PF3 from the police. Later on, PW5 had the appellant arrested with the assistance of a militiaman and taken to the police and ultimately his arraignment in court. Benjamini Mfaume, a Clinical Officer at Mlali, examined the victim and thereafter, he posted his findings in a PF3 (exhibit P1) showing that she had been penetrated judged from the pains she felt during examination and the presence of bruises and white mucus resembling sperms on her vagina.

In his defence, the appellant denied having committed the offence even though he did not deny that the victim had been at his house doing cleanness. He claimed that the case against him was fabricated by PW2 and PW4 due to jealous out of the praises and money he earned from his work. The trial court found the prosecution evidence sufficient to sustain the charge. Its findings were supported by the evidence of the victim which was found to have been sufficiently corroborated by the evidence of Ibrahim Hussein (PW7). PW7 was a tender age witness and also a madrassa student who is

shown to have been together with PW1 at the appellant's house for cleanliness on the material date and time. Likewise, the trial court relied on the evidence of PW6 who had testified that upon examination of the victim's vagina, he saw bruises and the victim complained of severe pains which suggested that she was penetrated. From this evidence, the trial court found the case against the appellant to have been proved beyond reasonable doubt followed by conviction and the appropriate sentence.

The appellant's appeal to the High Court sitting at Dodoma did not succeed. Even though the learned first appellate Judge had reservations against the findings of PW6 in exhibit P1, she found his evidence corroborating the victim's testimony that she was penetrated by none other than the appellant. The learned first appellate Judge was satisfied that the victim who had passed the test of **voir dire** and understood the duty to speak the truth, was not only competent, but also a trustworthy witness. She thus sustained the appellant's conviction and sentence. Her conclusion was notwithstanding the appellant's complaint that his case was fabricated and complaints in his grounds of appeal regarding contradictions and inconsistencies in the testimonies of the prosecution witnesses which she found to be immaterial to the conviction. In the aftermath, she dismissed the

appeal. Undaunted, the appellant has instituted the instant appeal predicated on 11 grounds of appeal. We must confess the difficulties in comprehending the grounds but, closely examined, the appellant is faulting the first appellate court on the following areas of complaint, namely: -

1. *That the judgment is null and void due to the variance between the section under which he was charged and the evidence.*
2. *Failure to hold that there was a variance between the particulars of the offence in the charge sheet and the facts read during the preliminary hearing together with the evidence on record.*
3. *That PW1's evidence was wanting in material particulars for simply saying that she was raped.*
4. *That the prosecution evidence was unreliable and uncertain since PW1 could not have sustained pains from rape and still run and go back to the madrassa and home.*
5. *That the prosecution did not tender any blood-stained cloth to prove that PW1's private parts were ruptured.*
6. *That PW6's evidence should not have been relied upon after the first appellate courts expressing its doubt on the PF3 (exhibit P1)*
7. *That the appellant's defence not considered vitiating the whole proceedings.*
8. *That the appellant's defence raised reasonable doubt in the prosecution case which should have been resolved in his favour.*

9. *That the contents of exhibit P1 were not read and the appellant was deprived opportunity to be heard upon the charge being read over.*
10. *Failure to assess the credibility of prosecution witnesses, to wit; PW2 did not see bleeding and rupture upon examination of PW1 considering the short interval between PW2's examination and PW6.*
11. *Failure to conduct forensic examination to confirm whether the sperms allegedly found from PW1 matched with the appellant.*

It will be noted that, before the first appellate court, the appellant had preferred only four grounds of appeal faulting the trial court for; one, the charge was defective, two, reception of the evidence of PW2 and PW3 contrary to section 127(2) of the Tanzania Evidence Act [Cap. 6 R.E. 2019]; three, his conviction in absentia was contrary to section 266 of the Criminal Procedure Act [Cap. 20 R.E. 2002] (the CPA); and, failure to consider defence evidence. It is trite law that the jurisdiction of this Court sitting on a second appeal is limited to dealing with grounds raising issues of law in terms of section 6(7) (a) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2019], (the AJA). Besides, in terms of section 4 (1) of the AJA read together with rule 72(2) of the Tanzania Court of Appeal Rules, 2009 (the Rules), the Court has no power to deal with grounds which were not raised before the first appellate court unless they involve points of law. In the premises, as grounds

3, 4, 5, 10 and 11 are purely on factual issues, we shall refrain from discussing them. There is a plethora of authorities in support of the course we have taken represented by the cases of; **Jafari Mohamed v. R.**, Criminal Appeal No. 112 of 2006, **Nazir Mohamed @ Nidi v. R,** Criminal Appeal No. 312 of 2014, **Thobias Michael Kitavi v. R**, Criminal Appeal No. 31 of 2017 and **Abdalah Ahamadi Likunja v. R,** Criminal Appeal No. 120 of 2018 (all unreported).

At the hearing of the appeal, the appellant appeared in person, unrepresented and informed the Court that he had nothing in addition to the grounds of appeal which he urged us to find merited and allow his appeal. For the respondent Republic was Mr. Morice Cyprian Sarara, learned Senior State Attorney resisting the appeal. At the outset, he informed the Court to direct his arguments on ground eight challenging the first appellate court for sustaining conviction on weak evidence which did not prove the case against the appellant to the standard required in criminal cases. In his view, that ground embraced all other grounds in the memorandum of appeal and so he saw no need to deal with each of them separately. Before doing that, the Court drew attention to the learned Senior State Attorney on the validity of the evidence of the victim in the light of the provisions of section 127 (2) of

the Tanzania Evidence Act [Cap. 6 R.E. 2019] as amended by the Written Laws (Miscellaneous Amendments) Act, No. 4 of 2016.

Mr. Sarara readily conceded that at the time PW1 gave her evidence, section 127(2) of Cap. 6 had already been amended abolishing the requirement to conduct *voir dire* test in respect of tender age witnesses before receiving their evidence. The learned Senior State Attorney pointed out that in this case, the trial court conducted a *voir dire* test and received PW1's unsworn testimony as she did not understand the meaning of oath instead of requiring her to promise to tell the truth and not to tell lies as required by section 127 (2) of Cap 6 following the amendments introduced by Act No. 4 of 2016 which came into force on 08/07/2016.

Guided by our decision in **Godfrey Wilson v. R,** Criminal Appeal No. 168 of 2018 (unreported) he had placed before us, the learned Senior State Attorney conceded that in consequence, PW1's evidence was invalid which should not have been relied upon by the two courts below in grounding the appellant's conviction. He had similar position with PW7's evidence which was equally received contrary to section 127(2) of Cap 6 which the trial court found to have corroborated PW1's testimony.

We respectfully agree with the learned Senior State Attorney that the evidence of the two tender age witnesses was invalid having been received without them promising to tell the truth and not lies as mandated by section 127 (2) of Cap. 6. As we held in **Godfrey Wilson v. R**, (supra) and other subsequent decisions, amongst others, **Bashiru Salum Sudi v. R.**, Criminal Appeal No. 379 of 2018 and **Issa Salum Nambaluka v. R.**, Criminal Appeal No. 272 of 2018 (both unreported), that evidence has no evidential value. That means, the trial court's finding of guilt could not have been grounded on the testimonies of PW1 and PW7 concurred by the first appellate court.

Nevertheless, Mr. Sarara contended that after discarding the evidence of PW1 and PW7, the remaining evidence from other witnesses will still suffice to sustain conviction. To achieve his destination, Mr. Sarara prefaced his submission with the matters which the prosecution was required to prove during the trial to secure conviction. **Firstly**, that a female child girl was carnally known by a man; **secondly**, that there was penetration; and **thirdly**, the accused is the person who had canal knowledge of the victim with or without her consent.

The learned Senior State Attorney was emphatic that the prosecution established each of the elements regardless of the absence of the evidence of

PW1. In this regard, the learned Senior State Attorney argued that the evidence of PW2, PW3 PW4, PW6, PW8 and PW9 proved beyond reasonable doubt all the above-mentioned elements. However, he conceded that in so far as the contents of the PF3 were not read aloud after its admission, it should be expunged for lack of evidential value. Likewise, midway, having realised that there was no proof that PW3; Zahara Hussein and elder sister to the victim met the test under section 127 (3) of Cap 6, her evidence could have been received as that of an adult witness. As it was not the case, the learned Senior State Attorney urged us to disregard it for lack of evidential value to which we agreed with him. Accordingly, PW3's evidence remains as it were worthless just as that of PW1 and PW7.

We must point out at this juncture that all things being equal, after discarding the testimonies of PW1 and PW7 on which the trial court grounded conviction supported by PW6's testimony and sustained by the first appellate court, there can no longer be any concurrent finding sustaining conviction since the only remaining evidence is that of PW6 which cannot stand by itself to ground conviction. That explains why the learned Senior State Attorney implored us to look at the remaining evidence. According to Mr. Sarara, there was no dispute that PW1 was a female child. The learned Senior State

Attorney admitted that although the charge sheet alleged that PW1 was nine years old, such evidence is not borne out from the record. The only evidence from PW2 and PW4 proved that she was a child attending madrassa for which the appellant did not dispute. In the premises, the learned Senior State Attorney argued that despite lack of proof that PW1 was less than ten years, there was sufficient proof that she was a female child below the apparent age of 18 years.

Secondly, Mr. Sarara argued that through the evidence of PW2, PW6 and PW8, it was established that there was penetration into PW1's vagina. This is so, the learned Senior State Attorney argued, PW2 was informed by the victim and her elder sister that she was raped by the appellant, she reported the matter to the mosque Imam who referred her to the mosque Secretary where both PW2 and PW8 inspected the victim's private parts. To substantiate that there was penetration, the learned Senior State Attorney pointed out that PW2 and PW8 testified that PW1's vagina had bruises and bleeding from rupture. Mindful of the settled law on the effect of failure to read the contents of an exhibit, Mr. Sarara urged the Court to expunge exhibit P1 whose contents were not read after it was cleared for admission. We accordingly expunge exhibit P1 from the record. All the same, Mr. Sarara

argued that the oral evidence of PW6 who examined the victim corroborated PW2 and PW8 since, upon the medical examination, he found that her vagina had bruises and white mucus resembling male sperms suggesting that there was penetration.

Lastly, as to the person responsible for the awful act, Mr. Sarara was firm that the evidence of PW2, PW4, PW8 and PW9 pointed an accusing finger to the appellant. With the foregoing, Mr. Sarara invited the Court to find that the case against the appellant was proved to the hilt and thus his appeal should be dismissed.

Upon the Court inviting the appellant to rejoin, he reiterated his initial prayers to consider his grounds of appeal and find them sufficient to allow the appeal, quash conviction and set aside the sentences.

Having heard the learned Senior State Attorney and considered the evidence on record, we have no slightest hesitation endorsing his submissions. **Firstly**, we agree that much as the prosecution did not lead evidence to prove that the victim was a girl below ten years, there was no dispute that she was a child below the apparent age of 18 years. The appellant admitted as such that PW1 was his student at the madrassa. As rightly submitted by Mr. Sarara, had the prosecution proved the victim's age

to be below ten years, the appellant would have earned a life sentence in lieu of 30 years imposed by the trial court and upheld by the first appellate court. Admittedly, the trial court's attention was alluded to the charge sheet which cited section 130 (1) (2) (b) (3) (e) instead of section 130 (1) (2) (e) of the Penal Code, but we are inclined to agree with Mr. Sarara that in itself did not prejudice the appellant the more so because the evidence adduced proved that PW1 was a child to whom that section applied. That will be sufficient to dispose the appellant's complaint in ground one and two.

Secondly, again, through the evidence of PW2 and PW8 who inspected the victim after the incident, there was proof of penetration into her vagina judged by the rupture of it, presence of bruises as well as bleeding. That evidence was corroborated by PW6 who, upon examining the victim, he found her complaining from pains. Besides, he found bruises on her vagina and white mucus resembling sperms which suggested that she was penetrated. The appellant's complaint in ground six challenging the validity of PW6's evidence is likewise rendered superfluous after discarding the impugned exhibit P1 with no adverse effect on PW6's oral evidence. That has been the Court's position in various decisions including **Thomas Robert Shayo v. R.**,

Criminal Appeal No. 409 of 2016 and **D.P.P. v. Erasto Kibwana & 2 Others**, Criminal Appeal No. 576 of 2016 (both unreported).

Thirdly, from the evidence of PW2, PW4, PW8 and PW9, the victim named Ustadh Idrisa as the person responsible for the rape. It was common ground that there was only one Ustadh Idrisa; the madrassa teacher in the village mosque who happened to be the appellant. Indeed, the appellant did not deny being the madrassa teacher but attributed his arrest to jealous from PW2 and PW4 associated with the money he earned from mosque sponsors and praises he got for his work. Through the evidence of PW5, on the information from PW4 who named Ustaadh Idrisa, as the rapist of her daughter, the appellant was subsequently arrested and taken to the police before being arraigned in court to stand the charge of rape.

In our view, the chronology of events and circumstances revealed by the prosecution witnesses coupled with the arrest of the culprit a few days later, pointed to the appellant as the person responsible for the rape.

There was a complaint in ground seven regarding failure to consider defence evidence by the trial court which subsisted all the way to the first appellate court. Mr. Sarara conceded that the trial court did not consider the appellant's defence. Even though he had pains in submitting that the High

Court had regard to it in its judgment, there is hardly any dispute that the High Court strayed into the same error as the trial court. Be that as it may, in view of our previous decisions particularly; **Joseph Leonard Manyota v. R**, Criminal Appeal No. 485 of 2015 and **Julius Josephat v. R,** Criminal Appeal No. 3 of 2017 (both unreported), we do not think that error was fatal to the whole proceedings as contended by the appellant. In such circumstances, the Court has held that the failure is tantamount to the two courts below failing to subject the entire evidence on record before coming to a concurrent finding of guilty as it were. Upon our close examination of the record, essentially, the appellant's defence before the trial court was that the case against him was fabricated by PW2 and PW4 out of jealousy due to the money he earned and praises from sponsors. Much as he did not have any burden of proving his innocence, that defence appears to be too remote to have raised any reasonable doubt in the prosecution's case. It is hard to comprehend how could PW 9; the mosque secretary cum BAKWATA Ward Secretary and his wife (PW8) volunteer to give evidence against a madrassa teacher in a framed-up case. There was no suggestion that these witnesses had any grudges against the appellant neither was it suggested that they hatched up a plan to lie against him. In the upshot, we are not persuaded that

notwithstanding the errors committed by the two courts below, the appellant's defence raised any reasonable doubt in the prosecution's case.

That said, we are satisfied, albeit from different evidence relied upon by the two courts below that the appellant's case was proved to the required standard. Accordingly, his appeal is devoid of merit and we dismiss it.

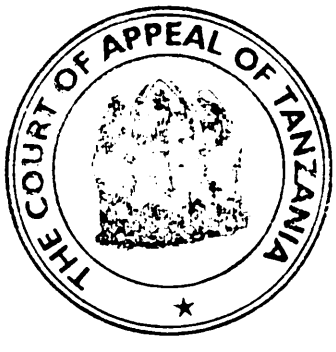
DATED at **DODOMA** this 27th day of August, 2021.

S. A. LILA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Judgment delivered this 27th day of August, 2021 in the presence of the Appellant in person and Ms. Salma Uledi, learned State Attorney for the Respondent is hereby certified as a true copy of the original.



S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL